No. 97-379

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

ALI DARAKSHAN, SORRAYA MOKHTARI DARAKSHAN and REZA VALIYEE,

Petitioners,

vs.

CITY OF BERKELEY, THE BERKELEY CITY COUNCIL, THE CITY OF BERKELEY BOARD OF ADJUSTMENTS, VIVIAN KAHN, GIL KELLEY, DAN LAMBERT and REGGIE MEIGS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court expand the application of the "rough proportionality" standard articulated in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) for determining the necessary balance between the impact of a proposed development and the amount of mitigation that may be exacted by the local permitting agency to mitigate that impact, to cases where permits are denied and therefore no impact or exaction exist?

2. Should this Court review a state court's determination that an adequate record was presented to it for review of an administrative decision?

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STATEMENT OF THE CASE

This petition arises out of the City of Berkeley's denial of a use permit to double the size of an existing single family home in an urban neighborhood of single family dwellings. The California courts determined that the City's decision was supported by substantial evidence in the administrative record and denied petitioners' request for a writ of administrative mandamus pursuant to California Code of Civil Procedure § 1094.5.

Petitioners now request that this Court grant their petition for writ of certiorari on the grounds that the issues considered by the California Court of Appeal in this case were "raised, but left unresolved by this Court's holding in *Dolan*." (Petition for Writ of Certiorari, p. 2.)

Petitioners mischaracterize the holding of *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) as well as the proceedings below. First, the California Court of Appeal, applying the standard set forth by the California Supreme Court in *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506 (1974), found that the City's decision was supported by proper findings which "bridged the analytic gap" between the evidence and the decision, and that each of the findings was supported by substantial evidence in the administrative record. Second, the Court of Appeal found that because the instant case involved the denial of a use permit, rather than the granting of a permit conditioned upon the imposition of an exaction, this Court's decision in *Dolan* did not apply:

> Petitioners' reliance on the holding of *Dolan* is erroneous in that *Dolan* only addresses those situations involving exactions. Quoting

> the court: "We granted certiorari to resolve a question left open by our decision in *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987), of what is the required degree of connection between the *exactions* imposed by the city and the projected impacts of the proposed development."

(Petition for Writ of Certiorari, Appendix C, p. 29.)

Here, there was no exaction. The issue addressed in *Dolan* is irrelevant to this case. Accordingly, there is no basis for this Court to grant the petition for writ of certiorari.

SUMMARY OF MATERIAL FACTS

Petitioners' statement of facts (Petition for Writ of Certiorari, pp. 3-6) is generally accurate, with one glaring exception. To place their misrepresentation in context, we briefly state the material facts below.

Ali Darakshan and Sorraya Mokhtari Darakshan own a single family house at 2244 Derby Street, Berkeley, California. On March 26, 1993 they applied for administrative issuance of a Use Permit under the City's Zoning Ordinance, to reinforce the foundation, raise the building and add three bedrooms and two bathrooms to the building. (Joint Appendix submitted to California Court of Appeal in lieu of clerk's transcript ("JA") at 108.) Under section 20.2 of the City's Zoning Ordinance, a Use Permit may only be issued if the Zoning Officer or Zoning Adjustments Board finds that

> . . . the establishment, maintenance or operation of the use or building applied for will not, under the circumstances of the

> particular case existing at the time at which the application is made, be detrimental to the health, safety peace, morals, comfort and general welfare of persons residing or working in the neighborhood of such proposed use or be detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the City.

On May 11, 1993 the City informed petitioners that their application could not be processed until they submitted additional information including an explanation as to why a five bedroom, three bath residence would not be detrimental under section 20.2, and therefore impermissible, when only one parking space was provided. (JA at 113.) The Zoning Officer also included the standard requirement that petitioners obtain the signatures of all of the owners of abutting and confronting properties indicating their lack of objection to the project. (*Id.*)

Petitioners' agent contacted five immediate neighbors and informed the City that three had signed the plans and two had refused. (JA at 115.) In a subsequent letter he explained that the additional bedrooms were necessary due to frequent visits from relatives. (JA at 119.) On July 23, 1993 the Zoning Officer issued her Notice of Proposed Zoning Decision indicating her intent to grant the Use Permit subject to several conditions. (JA at 121.) This Notice also included a request for public comment.

The Zoning Officer thereafter received several letters from neighbors objecting to the proposed decision. (JA at 132-135.) The neighbors' objections included obstruction of sunlight and creation of shadowing, as well as increased congestion due to pre-existing parking problems in the neighborhood.

The Zoning Officer notified petitioners that due to the level of neighborhood opposition, she would not approve the Use Permit administratively (JA at 137), and suggested that petitioners meet with their neighbors to resolve their concerns. She stated that if they failed to do so, she would deny the application and they could appeal to the Zoning Adjustments Board. Petitioners' agent requested the application to "follow its course to completion." (JA at 141.) Thus, the Zoning Officer issued her Notice of Proposed Decision to deny the Use Permit (JA at 96), and petitioners appealed to the Zoning Adjustments Board. (JA at 92.)

Petitioners summarize this process as: "On August 27, 1993 the Planning Department, pursuant to section 20.2 [of the Zoning Ordinance], rescinded its approval of the permit . . ." (Petition for Writ of Certiorari, p. 4.) We surmise that this misrepresentation is intended to convey the impression that the City's decision making was entirely arbitrary, and that a right properly granted was capriciously taken away. In fact, as described above, the City's process in cases where a permit may be issued by the Zoning Officer without a hearing, rather than by the City's appointed Zoning Adjustments Board after a public hearing, is to seek public input as to a proposed decision, and to consider the evidence that results. That is exactly what happened here; the City did not "rescind its approval of the permit."

The Zoning Adjustments Board held hearings on September 13, 1993 and September 27, 1993 and considered testimony and evidence from the neighbors as well as from petitioners' agents. (JA at 132-135, 139-154, 165-177.) On September 27, 1993 the Board voted to deny the Use Permit and made three findings. The first finding specifically describes the City's concern that detriment to the adjacent property to the east would result from the unreasonable obstruction of sunlight and air. (JA at 84.) The second finding describes how the proposed two-story structure

would be out of harmony with the surrounding development. (*Id.*) The third finding expresses the City's concerns about increased congestion resulting from the size of the project. (*Id.*) The Notice of Decision was issued on October 20, 1993. (JA at 84.)

On November 1, 1993 petitioners appealed the Board's decision to the City Council, which affirmed the Board's findings and decision at its regular meeting of January 11, 1994 on the basis of the written record and without taking further testimony. (JA at 65.)

REASONS FOR DENYING THE WRIT

I.

PETITIONERS FAIL TO ASSERT A PROPER BASIS FOR REVIEW OF THE CALIFORNIA COURT'S DECISION.

Rule 10 of the Rules of the Supreme Court of the United States describes the "character of the reasons" this Court will consider when determining whether to grant a petition for certiorari from the final decision of a state court of last resort. These include:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States Court of appeals has decided an important question of federal law that has not been, but should

> be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioners assert that this case is properly before this Court for review because "the issues raised by petitioners and decided by the court of appeals concern protection of fundamental rights afforded by the Constitution and the intents and purposes of the drafters thereof and that these issues were raised, but left unresolved by this Court's holding in *Dolan*." (Petition for Writ of Certiorari, p. 2.) As described below, however, the decision of the California court of appeal is not in conflict with *Dolan* because the standard of review articulated in *Dolan* does not apply to denials of permits. Rather, the California Court of Appeal decided this case under the standard of review articulated by the California Supreme Court in *Topanga*, 11 Cal. 3d 506. That decision does not conflict in any way with any decisions of this Court. Accordingly, certiorari is not proper and the petition should be denied.

II.

IN CALIFORNIA THE STANDARD OF REVIEW OF A QUASI-JUDICIAL DECISION DENYING AN APPLICATION FOR A LAND USE ENTITLEMENT WAS SET FORTH IN *TOPANGA*, AND PETITIONERS CONCEDE THAT THE CITY'S DECISION DENYING THEIR USE PERMIT APPLICATION MET THIS STANDARD.

Where, as here, a local agency in California makes an adjudicative land-use decision denying a permit, that agency must make specific findings in support of its decision. The purposes of such findings are to make the agency's decision-

making process orderly, to reduce the likelihood the agency will randomly leap from evidence to conclusion, to enable the parties to determine whether and on what basis to seek judicial review, and to apprise the reviewing court of the basis for the agency's decision. (*Topanga*, 11 Cal. 3d at 514-517.) Local agencies are afforded great discretion in the manner in which findings are recorded. (*See, e.g., Jacobsen v. County of Los Angeles*, 69 Cal. App. 3d 374, 390 (1977).) "It is enough if the findings form an analytical bridge between the evidence and the agency's decision." (*Topanga*, 11 Cal. 3d at 515.)

The agency's findings must be supported by substantial evidence in light of the whole administrative record. (California Code of Civil Procedure § 1094.5(c); *Arnel Development Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 518-19, n.8 (1980); *Guinnane v. San Francisco Planning Comm.*, 209 Cal. App. 3d 732, 742, n.7 (1989).) "Substantial evidence" means "[e]nough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (*Smith v. County of Los Angeles*, 211 Cal. App. 3d 188, 199 (1989).)

Here the trial court and the court of appeal upheld the City's decision under both prongs of the *Topanga* test: the findings supported the decision and the findings were supported by substantial evidence in the record. Petitioners do not challenge these holdings and no federal question was raised by the state court below.

III.

DOLAN DOES NOT ALTER THE REQUIREMENTS OF *TOPANGA*; THE STANDARD OF REVIEW ARTICULATED IN *DOLAN* DOES NOT APPLY TO ALL QUASI-JUDICIAL DECISIONS REGARDING LAND USE ENTITLEMENTS, RATHER, IT APPLIES ONLY TO THOSE WHICH REQUIRE DEDICATION OF PROPERTY OR EXACT MONEY AS CONDITIONS OF APPROVAL.

Petitioners do not challenge the California courts' conclusions under *Topanga*, but rather claim that since *Dolan*, 512 U.S. 374, 114 S. Ct. __, 129 L. Ed. 2d 304, California Code of Civil Procedure § 1094.5 and *Topanga* are no longer good law because *Dolan* somehow requires "denial" to be "roughly proportional" to impacts. (Petition for Writ of Certiorari, p.15.) This proposition is absurd on its face: where a project is denied, there is no impact to be mitigated and no exaction can be imposed which must be proportional to the (non-existent) impact. In any event, *Topanga* already requires the appropriate nexus between a governmental decision denying the permit and the impact to be avoided by denial: it requires findings justifying denial and substantial evidence in support of those findings. Thus, *Topanga* already requires rational decision making supported by adequate evidence.

Petitioners assert that certiorari is proper because there is "no principled basis for limiting *Dolan*'s holding to physical (or fiscal) appropriations" and thus that the heightened standard of scrutiny articulated by this Court in *Dolan* should apply to "all land use regulations made by an administrative agency acting in a quasi-judicial capacity." (Petition for Writ of Certiorari, p. 9-11.) Petitioners misunderstand and consequently, seek to misapply *Dolan* to this case. First we will discuss why there is

no taking here under the proper test, then we will address why *Dolan* does not apply.

A. Under The Existing Standard For Determining Whether The Application Of A Land Use Regulation To A Specific Property Constitutes Inverse Condemnation, There Has Been No Taking Here.

The application of a governmental regulation like a zoning ordinance constitutes inverse condemnation (a "taking" by regulation or "regulatory taking") only if the regulation fails to substantially advance a legitimate state interest or denies the owner all economically viable use of his or her land. (*Agins v. Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980); *Keystone Bituminous Coal Association v.DeBenedectis*, 480 U.S. 470, 485, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987).) Legitimate state interests have been construed broadly to include reducing population density, preserving light and air and advancing aesthetic values to promote general welfare. (*Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974); *William C. Haas v. City and County of San Francisco*, 605 F.2d 1117, 1120-1121 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980), *reh'g denied*, 446 U.S. 929 (1980).) The use permit process established by the City of Berkeley's Zoning Ordinance — and specifically the section at issue in this case — has been found to advance legitimate governmental interests and to be a proper exercise of its police power. (*See Groch v. City of Berkeley*, 118 Cal. App. 3d 518 (1981).) Petitioners do not assert that the City's decision was in any way inconsistent with the standard enunciated in its Zoning Ordinance, or that the City's decision was not supported by sufficient evidence. Thus, petitioners concede that the City's decision is valid under the "legitimate governmental purpose" prong of the *Agins-Keystone* test because it serves the legitimate governmental purposes set forth in the Zoning Ordinance.

A regulation which serves a legitimate state interest effects a taking only if it denies the owner economically viable use of the land. (*Agins*, 447 U.S. 255.) A regulation that does not eliminate any existing use of property does not effect a taking because it does not interfere with the owner's primary expectation of continuing the present use of the property. (*Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 130 (1978); *Oceanic California Inc. v. City of San Jose*, 497 F. Supp. 962, 974 (N.D. Cal. 1980).) Moreover, as long as the regulation permits reasonable beneficial use of the property, it does not effect a taking. (*Penn Central*, 438 U.S. at 124.)

Here, the City's decision to deny a permit to double the size of an existing single family home does not constitute a taking. Petitioners have an existing single family residence, the use of which was not affected in any way by the denial of the use permit to expand the dwelling. Clearly they have retained beneficial use of their property. Indeed, they do not claim otherwise.

Accordingly, under well-established precedent, petitioners have simply alleged no cognizable taking.

B. Petitioners' Argument That The Denial Of A Permit Is Equivalent To An Exaction Of Property Or Money Is Without Basis.

Instead, petitioners advance a new test for regulatory takings, by trying to shoehorn into the *Agins-Keystone* doctrine, the test articulated by this Court in the context of exactions of land or money in exchange for development permits. (*See Dolan*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 and *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996), *cert. denied*, __ U.S. __, 136 L. Ed. 2d 218 (1996).) The basis for petitioners' argument is their assertion that there is no difference between

an adjudicative decision denying a permit to expand an existing use on the ground of public detriment, and one exacting money or real property from an application in exchange for granting a permit. This assertion is factually incorrect and without legal basis.

The purpose of dedications and exactions is to mitigate the impacts of development; thus when the permission to develop is denied, dedications and exactions are not at issue. When a project is denied, there are no impacts to mitigate and no conditions are imposed. There is no exchange, no bargain, which the courts must scrutinize in order to ensure that government has not improperly taken advantage of its greater bargaining power. Accordingly, the standards set forth in *Dolan* logically cannot be applied in situations where there are no conditions imposing exactions or dedications.

In *Nollan v. California Coastal Commission*, 483 U.S. 825 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), this Court held that in order to exact land as a condition of a development permit, there must be an "essential nexus" between the impacts of the development and the exaction of property. (*Id.* at 837.) Since this Court found that the requisite nexus was not present in the case before it, it did not analyze the propriety of the amount of the land required to be dedicated.

In *Dolan* this Court then addressed the standard for evaluating the amount of land that could be exacted. It expressly limited its holding to resolving the question of "what is the required degree of connection between exactions imposed by the city and the projected impacts of the proposed development" in the context of the exaction of a possessory interest in property. (*Dolan*, 512 U.S. at __, 129 L. Ed. 2d at 311.) This Court concluded that the amount of dedication of land exacted as a condition of approval of a development project must be "roughly

proportional" to the impacts of that development. Rough proportionality does not require a precise mathematical calculation, but merely an individualized determination that the exaction is related both in nature and extent to the project's impacts. (*Dolan*, 512 U.S. at __, 129 L. Ed. 2d at 320.)

Finally, and most recently, this Court denied certiorari in *Ehrlich*, 12 Cal. 4th 854, *cert. denied*, __ U.S. __, 136 L. Ed. 2d 218. In *Ehrlich*, the California Supreme Court, (on review after remand from this Court to the court of appeal ordering it to reconsider its decision in light of *Dolan*), applied *Nollan* and *Dolan* to exactions of money where such exactions were imposed on an ad hoc basis in connection with a land use approval for an individual project, rather than pursuant to an ordinance or resolution of general application. Relying on *Nollan*, the court characterized the type of police power exercise at issue in *Ehrlich* as "leveraging" — "the imposition of *unrelated* exactions as a condition for granting permit approval". (*Id.* at 868, emphasis in original.) "It is in this paradigmatic permit context — where the individual property owner-developer seeks to negotiate approval of a planned development — that the combined *Nollan* and *Dolan* test quintessentially applies." (*Id.*) The *Erhlich* court then concluded that the *Nollan-Dolan* test is applicable only in a

> . . . relatively narrow class of land use cases — those exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation. Neither *Nollan* nor *Dolan* is, after all, a conventional regulatory takings case. Rather, as the court's rationale in *Nollan* demonstrates, both are cases in which the local government attached a condition to the issuance of a development

> permit which *but for* the claim that the exaction is justified by the greater power to deny a permit altogether, would have amounted to an uncompensated requisition of private property.

(*Id.*, emphasis in original.)

The underlying rationale for this heightened scrutiny is the

> . . . inherent and heightened risk that local government will manipulate the police power to impose conditions *unrelated* to legitimate land use regulatory ends, there by avoiding what would otherwise be an obligation to pay just compensation . . . It is the imposition of land-use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sine qua non for application of the intermediate standard of scrutiny formulated by the court in *Nollan* and *Dolan*.

(*Id.* at 869, emphasis in original.)[1]

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1. In his concurring opinion in *Kavanau v. Santa Monica Rent Control Board*, __ Cal. 4th __ (1997) (No. S051847, decided August 26, 1997) 97 C.D.O.S. 6858, California Supreme Court Justice Mosk notes, "The notion that rent control laws may now be subject to a more exacting form of constitutional scrutiny is predicated on a reading of *Nollan v. California Coastal Commission* (1987) 483 U.S. 825. (See Radford, supra 22 SW U.L. Rev. at 1030.) We have rejected elsewhere the contention that *Nollan* and the related case of *Dolan v. City of Tigard* (1994) 512

(Cont'd)

This is consistent with this Court's articulation of the rationale for heightened scrutiny as set forth in *Nollan*:

> . . . our cases describe the condition for abridgement of property rights through the police power as a "substantial advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjectives where the actual conveyance of property is made a condition for the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

(*Nollan*, 483 U.S. at 841.)

In short, the *Nollan-Dolan* standard, as elaborated by *Ehrlich*, applies only where the government (1) *exacts property or money* (2) *on an ad hoc*[2] *basis* (3) *as a condition for issuance of a permit*. It applies in this "relatively narrow class of . . . cases" because only such cases present the risk present that the government will use its police power to give itself an unfair advantage in negotiating a project approval.

As petitioners concede, only one of the three criteria which trigger this level of scrutiny is present here: an adjudicative

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(Cont'd)

U.S. 374 represent a new standard of scrutiny of governmental regulation other than those regulations that require either a physical dedication of property, or a development fee levied on an 'individual and discretionary basis.' (*Erhlich v. City of Culver City* (1996) 12 Cal.4th 854, 876.)" (*Kavanau*, 97 C.D.O.S. at 6864, fn.1.)

2. *I.e.*, in an adjudicative decision.

decision. There was no approval, and *a fortiori* there was no exaction. There was no risk of "leveraging" the police power or using it to drive an unfair bargain and accordingly no need for *Dolan* scrutiny. Rather, the applicable standard of review is that set forth by the California Supreme Court in *Topanga*, 11 Cal. 3d 506, 510: whether the City made legally adequate findings to support its decision, and whether those findings and the decision were supported by substantial evidence in the record. Because petitioners challenge neither leg of this test in their petition for writ of certiorari, it should be denied.

IV.

THE RECORD WAS ADEQUATE AND PETITIONERS' CONTENTION TO THE CONTRARY DOES NOT JUSTIFY A GRANT OF REVIEW.

Petitioners contend that they have been denied procedural due process because the transcript of one of the two hearings before the City's Zoning Adjustments Board was defective and had to be reconstructed based on the Zoning Officer's contemporaneous notes, and because there is a gap in the audiotape of the City Council meeting. This argument offers no ground for this Court to grant certiorari. The law in California is not in conflict with the federal law, nor have petitioners identified any such conflict in any of the decisions they cite, or the state court of appeal decision at issue herein. Nor is certiorari necessary to settle an important question of federal law.

There is no shortage of authority regarding the basic rules applicable to administrative records. (*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971) (judicial review of Secretary of Transportation's decision to approve route and design of roadway must be based on full administrative record); *Federal Trade Comm. v. Standard*

Oil Co., 355 U.S. 396, 78 S. Ct. 369, 2 L. Ed. 2d 359 (1958) (Supreme Court will affirm decision of court of appeals vacating order of FTC regarding discriminatory pricing where case turned on factual issue decided by court on fair assessment of the record); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1950) (court reviewing decision of the NLRB must consider all the evidence in the record, not just the evidence which supports the decision); *Hiatt Grain & Feed, Inc. v. Bergland*, 446 F. Supp. 457 (1978), *aff'd*, 602 F.2d 929 *cert. denied*, 444 U.S. 1073, 100 S. Ct. 1019, 62 L. Ed. 2d 755 (1980) (plaintiff must affirmatively demonstrate that the administrative record upon which defendant's decision was made was inadequate, otherwise review must be limited to the administrative record).)

This case simply represents one application of the well settled rules regarding review of administrative records to a specific factual situation. Thus, there is no basis for this Court to grant review.

It is beyond dispute that petitioners challenging an adjudicative action are entitled to have the record of the proceedings presented to the court for review. (*Bixby v. Pierno*, 4 Cal. 3d 130, 144 (1971), citing *Universal Camera*, 340 U.S. 474.) However, the adequacy of such records is not a matter of form but of substance and functionality. All that is required is a "record of the proceedings adequate to enable a court to pass upon the validity of the administrative action . . . ." (*Aluisi v. County of Fresno*, 159 Cal. App. 2d 823, 826 (1958).) The gaps in the audio-tape recording of one of the administrative hearings in this proceeding were reconstructed by way of the Zoning Officer's contemporaneous notes (JA at 76-77), an acceptable method under California law and not inconsistent with any federal authority cited by petitioners. (*Chavez v. Civil Service Commission*, 86 Cal. App. 3d 324, 332 (1978); *Chas. L. Harney,*

Inc. v. Board of Permit Appeals, 195 Cal. App. 2d 442, 445 (1961).)

Appellants imply that the Zoning Officer's contemporaneous notes must be presumed to be somehow inaccurate because of "the natural biases one would suspect an employee of the city would have for the city . . ." (Petition for Writ of Certiorari, p. 19.) To the contrary, however, the Zoning Officer's contemporaneous notes must be presumed to be accurate, rather than inaccurate (California Evidence Code § 664), especially given petitioners' complete failure to specify a single respect in which her notes are inaccurate or incomplete.[3]

Petitioners have failed to demonstrate any defects in the administrative record that render it inadequate "to enable a court to pass upon the validity of the administrative action . . . ." (*Aluisi*, 159 Cal. App. 2d at 826.) Absent such a showing by petitioners, it was proper for the California courts to review the record submitted. (*Hiatt*, 446 F. Supp. 457.) There is no conflict in the law regarding review of administrative records and there is no showing that the well settled law was misapplied in this case. Most importantly, none of these issues concerning the record raise federal questions. Accordingly, there is no basis for this Court to grant review.

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3. With respect to the City Council hearing, the gap in the tape occurs during the Zoning Officer's presentation of the facts, all of which are also set forth in the more than seventy pages of administrative record presented for the trial court's review. (JA at 65-176.) Moreover, as required by the Zoning Ordinance, the City Council based its decision to affirm the Zoning Adjustments Board's denial of the permit solely on the written record, thus there was no additional testimony taken to which a reviewing court was denied access. Petitioners have failed to suggest how the lack of a verbatim transcript of the Zoning Officer's presentation of the written materials already contained in the record to the City Council resulted in any relevant or material omissions from the record before the trial court.

CONCLUSION

For all of the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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